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No. 82-755

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALICE TOOMEY,
Respondent,

vs.

JAMES MICHAEL TOOMEY,
Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri

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QUESTIONS PRESENTED

Does the Decision by the Missouri Supreme Court which recognizes that the length and nature of a prior marriage between the same parties whose remarriage is being dissolved is a relevant and material fact, among many, to consider in determining an award of maintenance and in dividing marital property, create an arbitrary and irrational classification of domestic relations litigants in violation of the Equal Protection provision of the Fourteenth Amendment to the United States Constitution?

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CONSTITUTION AND PROVISIONS CITED

U. S. Constitution, Amendment Fourteen, Section 1 . . 3,7,10,11

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Section 452.335 R.S.Mo. 4,7,8

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To the Supreme Court of Missouri

Respondent, Alice Toomey, for the reasons hereinafter set forth opposses the Petition for Writ of Certiorari and requests that the Court deny the same.

SUPPLEMENTAL STATEMENT OF THE CASE

Respondent adopts Petitioner's Statement of the Case with the following additions.

The evidence showed that the Petitioner, James Michael Toomey, was a licensed physician, and as of the time of the trial was employed by Washington University at Barnes Hospital. He was also employed as a physician part-time by the City of St. Louis. His gross monthly income from employment was Five Thousand Six Hundred Fifty-Two Dollars ($5,652.00). The evidence further showed that Respondent, Alice Toomey, at one time had been licensed as a registered nurse but had not

worked as a nurse for approximately twenty-two (22) years. At the time of trial, she was neither registered nor licensed to practice nursing in any state. At the time of trial, she was employed part-time as a hostess at Calico's Restaurant in Chesterfield, Missouri. Her gross pay per month was some Three Hundred Ninety-Four Dollars ($394.00). Their first marriage of over twenty (20) years ended in divorce in Connecticut. Within approximately a year they were remarried on August 31, 1976 in Missouri.

On appeal she challenged the child support Judgment as to whether it was enforceable, the maintenance award, and the division of property. With respect to the maintenance award she raised two (2) primary issues. First, she contended that the Circuit Court erred in providing that the maintenance should terminate after the expiration of five (5) years, rather than making the same for an indeterminate period since there was no evidence in the record concerning what the parties future financial condition would be or that there would be any expected change in the future. Secondly, she contended that the amount of the award was inequitable and inadequate under the totality of the circumstances. In this regard, she raised the refusal of the Circuit Court to considering the totality of her relationship with Dr. Toomey, including the length of their first marriage and the fact that during the majority of this period she had not been employed but had been a wife, mother and homemaker.

On August 23, 1982, the Missouri Supreme Court overruled Petitioner's Motion to Stay the issuance of its mandate pending the filing and ruling on a Petition for Writ of Certiorari with this Court. The mandate has issued to the Circuit Court of St. Louis County and further proceedings are now pending there.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment XIV, Section 1. The said United States Constitution, Amendment XIV, Section 1 provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 452.330.1 R.S.Mo. 1978. The said Section 452.330.1 R.S.Mo. 1978 provides:

> 1. In a proceeding for nonretroactive invalidity, dissolution of themarriage or legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall set apart to each spouse his property and shall divide the marital property in such proportions as the court deems just after considering all relevant factors including:
>
> (1) The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;
>
> (2) The value of the property set apart to each spouse;
>
> (3) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children; and

(4) The conduct of the parties during the marriage.

Section 452.335 R.S.Mo. 1978. The said Section 452.335 R.S.Mo. 1978 provides:

1. In a proceeding for nonretroactive invalidity, dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order to either spouse, but only if it finds that the spouse seeking maintenance

(1) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and

(2) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

2. The maintenance order shall bein such amounts and for such periods of time as the court deems just, and after considering all relanvant factors including:

(1) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(2) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(3) The standard of living established during the marriage;

(4) The duration of the marriage;

(5) The age, and the physical and emotional condition of the spouse seeking maintenance;

(6) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance; and

(7) The conduct of a party seeking maintenance during the marriage.

ARGUMENT IN OPPOSITION TO THE GRANTING OF THE WRIT

I

This Court Should Deny The Petition For Writ Of Certiorari In That Domestic Relations Are Matters Falling Within The Purview Of The States To Regulate, No Substantial Federal Question Has Been Presented, And The Decision By The Missouri Supreme Court Which Recognizes That The Duration Of A First Marriage To The Same Party Is A Material And Relevant Fact To Consider In Determining An Award Of Maintenance And In Dividing Marital Property Does Not Arbitrarily Or Irrationally Otherwise Discriminate Between Domestic Relations Litigants.

This case presents no federal question or matters of federal law. At issue is the amount of maintenance (alimony) to which Respondent is entitled and how the marital property should be divided and apportioned upon the granting of a Decree of Dissolution of their marriage (divorce). Such are matters purely of state concern within the powers of the several states to regulate and fall beyond the purview of the laws of the United States.

Thus, it has long been held and recognized that federal courts must decline to assert jurisdiction over divorce cases unless a substantial federal question is present. See *Hisquierdo* v. *Hisquierdo,* 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979). Even if a federal question is present, there must be more than a mere conflict. In the *United State* v. *Yazell,* 382 U.S. 341, 352, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966), this Court recognized that "state family and family property law must do 'major damage' to 'clear and substantial' federal interests before the supremacy clause will demand that state law be overridden." Only the state courts, and not the federal courts have the jurisdiction and the authority to determine the amount of maintenance to which

Respondent should be awarded and how the marital property, which had been acquired, should be divided and apportioned. This is so even if Certiorari be granted. See *Stanton* v. *Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975).

Petitioner would contend, however, that the decision of the Missouri Supreme Court in its interpretation of Section 452.335 R.S.Mo. has created an arbitrary and irrational classification of litigants which does not bear a fair and substantial relation to the purposes of maintenance award. In his view, all other factors being similar, there should be no distinction between a person seeking to dissolve a second marriage with their original spouse as distinct from a person simply seeking to dissolve a second marriage to a stranger. Thus he contends he has been placed in a separate and different class of litigants which is totally unrelated to the purposes of the statute in violation of the Fourteenth Amendment to the Constitution. There is, as shown below, a substantial difference.

In order to determine whether this case presents a violation of the Equal Protection Clause of the Constitution requires a two-prong analysis. First, has the Missouri Supreme Court actually created two distinct and separate classification of litigants who will be treated differently. Secondly, if so, is there a reasonable basis for the classification which is not arbitrary and which rests upon a ground of difference having some fair and substantial relation to the object of the legislation. See, *Reed* v. *Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971); *Stanton* v. *Stanton, supra.*

Contrary to the contention of Petitioner, the opinion by the Missouri Supreme Court has not created two different classes of domestic relations litigants. Rather, all that the Supreme Court has recognized is that each domestic relations case as to awards of maintenance and the division of property must be decided upon its own individual facts and circumstances. In Missouri, a divorce or dissolution proceeding is an action at law, "sui

generis". Nevertheless, the courts have long held that it partakes of the nature of a suit in equity in which a court is to apply equitable principles. *State ex rel. Couplin* v. *Hostetter,* 129 S.W.2d 1 (Mo. 1939); and *In Re: the Marriage of Breen,* 560 S.W.2d 358 (Mo. App. 1977).

Thus, the Missouri Supreme Court, has simply recognized that in applying the equitable principles, that if there has been a prior marriage between the same parties such fact is one more relevant fact which should be considered by the Missouri trial courts in determining what constitutes a fair and equitable division of the marital property and in determining what constitutes a fair and equitable award of maintenance (alimony) under the circumstances. Petitioner argues, a prior marriage, whether to the same spouse or to a stranger, is a totally irrelevant and immaterial fact since §452.335.2(3) and (4) only refer to the duration of and to the standard of living established during the present marriage. Thus he contends that what has occurred and what has been the situation of either of the parties prior to the present marriage simply has no relevancy on how marital property should be divided or on an award of maintenance. Such position, however, misinterprets and misapplies Missouri law and ignores the realities of life.

The Missouri Supreme Court simply recognized that the enumerated factors set forth in the statutes as to what should be considered by the Court in dividing the marital property and in awarding maintenance are not exclusive.[1] Rather, since the enumerated factors are preceeded by the words "as the Court deems just, [and] after considering all relevant factors including:" the Courts have long recognized that they are not words of limitation. See *Lockett* v. *Lockett,* 558 S.W.2d 387

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[1] These statutes are §452.330 R.S.Mo. (division of property); and §451.335 R.S.Mo. (maintenance).

(Mo. App. 1977). Also see, *Poague* v. *Poague,* 579 S.W.2d 822 (Mo. App. 1977). The opinion by the Missouri Supreme Court in this case has only reaffirmed what has long been Missouri law, to-wit: That the Courts are to consider the totality of the relationship and situation of the individual parties before it. No separate classification of litigants has thus been created. Rather each case, as any equity matter, must be decided and determined upon the individual facts, circumstances and merits presented.

Contrary to Petitioner's statement, the basis for an award of maintenance is more than to simply to provide "subsistance for the spouse". His citation to *Dyche* v. *Dyche,* 570 S.W.2d 293, 296 (Mo. Banc. 1978) has been taken out of context. That case simply recognized that maintenance, as contrasted with old law prior to the reform in 1974, no longer includes awards for attorney's fees and debts owing to third parties. These are awarded separately. Even though there is a new emphasis on self sufficiency and awards of maintenance are not made to punish, nevertheless, Missouri Courts also recognize that in the interests of social welfare and justice, one purpose of maintenance is to permit a spouse to maintain a similar standard of living as that previously enjoyed, in so far as the finances of the parties allow. See *Phelps* v. *Phelps,* 620 S.W.2d 462 (Mo. App. 1981).

But most importantly, despite Petitioner's characterization, there is a rational and significant difference between a remarriage to the same spouse and second remarriage which is to a stranger. The past has meaning. It cannot be negated. During the first marriage a standard of living is created and established. Children may be born and raised. Then marital difficulties result in a divorce. Precisely what the marital difficulties are and what the reasons are for a remarriage between the parties may vary from case to case. The remarriage between the parties may be due to numerous inducements, representations and promises to correct prior behavior which resulted in the divorce. Such factors will not be present when there is a second marriage to a stranger.

The precise reasons why the parties here were originally divorced and why they remarried is not shown by the record. But, they did remarry within a year. There was no intervening marriage. During their first marriage they had six (6) children. Respondent gave up her career and profession as a registered nurse. Instead, she devoted long years to Petitioner as a wife, mother and homemaker. Upon their remarriage, Respondent continued to be the wife, mother and homemaker. These facts all should intertwine to determine what constitutes a "reasonable" award of maintenance and a "fair and equitable" division of property.

Missouri is not the first state to hold or to recognize that a prior marriage between the same parties can and should be considered. See *Kantaris* v. *Kantaris*, 169 N.W.2d 824 (Iowa 1969); *Whitting* v. *Whitting*, 267 S.2d 472 (Ala. 1972); and *In Re: the Marriage of Reilly*, 577 P.2d 840 (Mont. 1978). In contrast, a second marriage between two strangers presents a totally different and distinct factual and emotional situation.

The decision by the Missouri Supreme Court is not arbitrary or irrational. There has been no violation of the Equal Protection Clause.

CONCLUSION

Petitioner is obviously dissatisfied with the mandate and opinion of the Missouri Supreme Court. But, the factors which are to be considered by a Court in awarding maintenance and in dividing marital property are purely questions of state law and are beyond the power of the federal courts to regulate or to determine. A rational basis exists for a court to also take into consideration the totality of the relationship which has existed between the parties which can include the fact and the duration of a prior marriage between them. A dissolution of a second marriage to a stranger presents an entirely different situation. The factual situation of this case does not present any violation of the Equal Protection Clause. Certiorari should be denied.

Respectfully submitted,

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